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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO FABIAN VALDEZ,

Defendant and Appellant.

F069789

(Super. Ct. No. CRL008375)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Marc A. Garcia, Judge.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Peña, J.

Defendant Sergio Fabian Valdez was convicted by jury trial of driving under the influence with a prior (Veh. Code, §§ 23152, subd. (a), 23550.5, subd. (a); a felony), driving while having a blood-alcohol content of 0.08 percent or more with a prior (Veh. Code, §§ 23152, subd. (b), 23550.5, subd. (a); a felony), and reckless driving (Veh. Code, § 23103, subd. (a); a misdemeanor). The jury found true allegations that he had suffered a prior strike conviction within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d))¹ and had served four prior prison terms (§ 667.5, subd. (b)). The trial court denied defendant's *Romero*² motion to dismiss the prior strike conviction—a 1998 conviction for driving under the influence and causing great bodily injury to another (Veh. Code, § 23153)³—and proceeded to sentence him to nine years in prison under the Three Strikes law. On appeal, defendant contends the trial court abused its discretion when it refused to dismiss his prior strike conviction. We modify the judgment and affirm.

FACTS

On July 13, 2012, California Highway Patrol Officer Smith was patrolling in a marked patrol vehicle. At about 11:22 p.m., he observed a yellow Chevy pickup truck traveling in the fast lane of State Route 152 at approximately 100 miles per hour. The speed limit was 65 miles per hour. Officer Smith conducted a traffic stop and approached the passenger side of the truck. Defendant was driving and a female was in the passenger seat. Officer Smith smelled the odor of an alcoholic beverage emitting from the interior of the truck and noticed that defendant's eyes were red and watery, an indication of

¹ All statutory references are to the Penal Code unless otherwise noted.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530 (*Romero*).

³ The complaint alleges the prior strike conviction in case No. 22684 occurred on January 6, 1999, but the abstract of judgment states that the conviction occurred on November 17, 1998, and the sentencing hearing occurred on January 6, 1999. The probation report also notes the November 17, 1998 conviction date. Accordingly, we will refer to the prior strike conviction as occurring in 1998.

possible impairment. But defendant denied having consumed any alcohol. Officer Smith checked his eyes and immediately observed nystagmus and asked defendant to exit the truck. Officer Smith had defendant perform a series of field sobriety tests. The preliminary alcohol screening device gave a reading of 0.10 percent blood-alcohol concentration. Based on all of these test results, Officer Smith concluded defendant was under the influence of alcohol. Officer Smith also believed defendant had been driving recklessly. At the station, defendant's breath tested at 0.09 and 0.10 percent blood-alcohol concentration.

Defense Evidence

Defendant's passenger testified that defendant was her stepfather. She was travelling with him from Merced to Los Banos. Defendant was stopped for speeding that night. In her opinion, he was speeding, but driving safely.

DISCUSSION

I. *Romero Motion*

A. *Law*

Section 1385 grants trial courts the discretion to dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530.) A defendant bears the burden of clearly showing the trial court's decision not to do so was arbitrary or irrational. Absent such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377 (*Carmony*).)

““A court's discretion to strike [or vacate] prior felony conviction allegations [or findings] in furtherance of justice is limited. Its exercise must proceed in strict compliance with ... section 1385[, subdivision] (a).”” (*People v. Williams* (1998) 17 Cal.4th 148, 158.) The Three Strikes law “was intended to restrict courts' discretion in sentencing repeat offenders.” (*Romero, supra*, at p. 528; *People v. Garcia* (1999) 20 Cal.4th 490, 501 [“a primary purpose of the Three Strikes law was to restrict judicial

discretion”].) The Three Strikes law establishes “a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike,” *unless* the sentencing court finds a reason for making an exception to this rule. (*Carmony, supra*, 33 Cal.4th at p. 377.) There are “stringent standards that sentencing courts must follow in order to find such an exception.” (*Ibid.*) In order to dismiss a prior strike conviction, “the court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, at p. 161.)

“[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, ‘the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [] an “arbitrary, capricious or patently absurd” result’ under the specific facts of a particular case. [Citation.] [¶] But ‘[i]t is not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegation.... Because the circumstances must be ‘extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors ... manifestly support the striking of a prior conviction and no reasonable

minds could differ—the failure to strike would constitute an abuse of discretion.”
(*Carmony, supra*, 33 Cal.4th at p. 378.)

B. Background

The probation officer’s report summarized defendant’s criminal history:

“The defendant’s prior history is very lengthy. His prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous and serious in nature. His record reflects he was committed to the California Department of Corrections on more than one occasion, the first commitment being in 1995. The defendant’s prior performance on probation and parole has been unsatisfactory and he was in fact, on parole when he commitment [*sic*] the instant offense.

“As documented in his statement, the defendant does not take responsibility of for [*sic*] his actions, and believes he has been wrongly convicted.”

According to the report, defendant’s criminal history began when he was about 17 years old and included the following. About 1987: false identification to a peace officer. About 1988: appropriation of lost property and disturbing the peace by offensive words. 1990: driving on a suspended or revoked license, driving while under the influence, and driving on a suspended or revoked license. 1991: driving while under the influence and driving with a blood-alcohol concentration of 0.8 percent or greater. 1992: misdemeanor inflicting corporal injury on a spouse, felony assault with a deadly weapon, and misdemeanor inflicting corporal injury on a spouse. 1993: petty theft, driving on a suspended or revoked license, two counts of insufficient funds, and felony inflicting corporal injury on a spouse. 1994: misdemeanor resisting a peace officer. 1995: felony inflicting corporal injury on a spouse. 1998: two counts of driving while under the influence and causing great bodily injury, two counts of driving with a blood-alcohol concentration of 0.8 percent or greater and causing great bodily injury, felony hit and run with injury, and driving on a suspended or revoked license. 2005: driving while under the influence with a prior and driving on a suspended or revoked license. 2011: felony

possession of a firearm by a felon. In 2012, he was charged with felony possession of methamphetamine, but this matter remained unresolved at the time the probation report was prepared. In addition, his history included approximately 18 violations of probation and parole.

The probation report noted that defendant stated he did not feel there was evidence to convict him in this case; he said the subject in the video was not him because that man was taller and skinnier than he. He also said he “wanted to do a program before [he] caught this case and [he] was looking at who might accept [him].” He said he had been denied by one program.

At the sentencing hearing on July 7, 2014, defendant raised an oral *Romero* motion. He moved to dismiss his 1998 strike conviction for driving under the influence and causing great bodily injury (Veh. Code, § 23153) on the ground that it was remote in time, even though there had been “some intervening activity.” The prosecution countered that the court should deny the motion due to “the very extensive criminal record of the defendant, both in terms of his adult and juvenile life in general and the fact that he committed offenses including serious DUI offenses between the time of the strike and now.”

The trial court denied the motion, referring to defendant’s “extensive criminal history.” Then the court added:

“The continuous course of criminal conduct of the defendant is clearly a fact to be taken into consideration. In fact, I will note the defendant was not only on parole but was on probation as well when this crime was committed, meaning the DUI, and therefore the Court does not believe the defendant falls outside the scheme and purpose of the Three Strikes Law, deny the *Romero* motion as well.”

C. Analysis

Defendant now contends the trial court abused its discretion when it refused to dismiss the 1998 strike conviction because it was remote in time and because the current

offenses involved alcohol and no violence. He explains that his “behavior [in committing the strike offense] was deplorable” and “reprehensible,” but “not a manifestation of a propensity for violence” or an “intent to do harm.” He says that following the strike offense, he had an “exasperating criminal history characteristic of addicted persons, ... [but] he did not commit a violent felony.” He was never able to treat his addiction effectively, and thus “[h]is criminal history seemed to reflect a struggle with his addiction, rather than a predisposition to commit violence against others.” He argues that the trial court did not consider the nature and circumstances of the current offenses, which, like the strike offense, arose from alcohol abuse and did not involve a deliberate attempt to harm anyone. He notes that although the current offenses were serious, reckless, and careless, they involved driving under the influence with only a slightly elevated blood-alcohol and without causing an accident or injury. He maintains that the nature of the current offenses did not demonstrate recidivist tendencies toward violence. For these reasons, he believes he falls outside the spirit of the Three Strikes law.

As we have observed before, this is not the extraordinary case imagined by *Carmony*, where there can be no doubt that the defendant, although a career criminal, nevertheless falls outside the spirit of the Three Strikes law. (*Carmony, supra*, 33 Cal.4th at p. 378.) The fact that many of defendant’s offenses have involved alcohol does not relieve him from the operation of the Three Strikes law. Drug or alcohol addiction “is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment.” (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.) Indeed, defendant’s prolonged alcohol abuse and repeated alcohol-related offenses suggest his prospects for rehabilitation are bleak. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 322; *People v. Martinez, supra*, at p. 1511; see *In re Handa* (1985) 166 Cal.App.3d 966, 973-974 [“Drug use or drug addiction at the time of an offense is an example of a disputable factor in mitigation. The sentencing court may find that drug use did not significantly affect the defendant’s capacity to exercise

judgment or, in the case of an addiction of long standing, that the defendant was at fault for failing to take steps to break the addiction”].)

Similarly, the fact that defendant’s current offenses were nonviolent does not mandate the granting of his *Romero* motion. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 344 [reversing order granting *Romero* motion based on nonviolent nature of current offense because “the nonviolent or nonthreatening nature of the felony cannot alone take the crime outside the spirit of the law”]; see also *People v. Poslof* (2005) 126 Cal.App.4th 92, 108-109 [current crime of failing to register as sex offender was nonviolent; denial of *Romero* motion was not abuse of discretion]; *People v. Gaston, supra*, 74 Cal.App.4th at p. 321 [current crime of car theft was “not as serious as many felonies” but was “far from trivial”].) Defendant’s many alcohol-related driving offenses over the course of about 22 years—including those causing great bodily injury—demonstrate an appalling disregard for the lives and safety of others. His casual remark that the evidence against him was insufficient because the perpetrator was taller and thinner reveals a cavalier attitude toward his history of drunk driving and an unwillingness to take responsibility for his actions. Based on these facts, it was reasonable for the trial court to conclude that defendant has not responded to rehabilitative efforts and continues to pose a serious danger to the community. Consequently, defendant’s alcohol-related offenses and nonviolent current offenses do not remove him from the spirit of the Three Strikes law. The trial court did not abuse its discretion in refusing to dismiss the prior strike conviction.

II. Stayed Prior Prison Term Enhancement

The People point out that the trial court imposed and stayed the term on Enhancement No. 4, a prior prison term enhancement (§ 667.5, subd. (b)). We agree this was error. A trial court must either impose or strike, but not stay, a prior prison term enhancement pursuant to section 667.5, subdivision (b). (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [“the trial court may not stay the one-year enhancement, which is

mandatory unless stricken”]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311 [“the court must either impose the prior prison enhancements or strike them”].) “The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal.” (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) The trial court’s comments show that it did not intend to impose the enhancement.

Accordingly, we will strike the enhancement rather than remand for resentencing to enable the trial court to explicitly exercise its discretion. Such a remand would be a waste of judicial resources where the trial court’s intention is clear.

DISPOSITION

The judgment is modified to strike the one-year prior prison term enhancement (§ 667.5, subd. (b)) that was previously stayed. The trial court is directed to amend the minute order and abstract of judgment and to forward certified copies to the appropriate entities. As so modified, the judgment is affirmed.